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# **Intercountry Adoption Under the Hague Convention: Still an Attractive Option for Homosexuals Seeking to Adopt?**

LISA HILLIS\*

## **INTRODUCTION**

See Dick. See Jane. See Dick and Jane grow up, fall in love, and get married. See Jane give birth to a healthy baby boy. See Dick, Jane, Baby, and their dog, Spot, live happily ever after. Now see this. In the world today, millions of children are homeless, orphaned, or abandoned.<sup>1</sup> They live amid poverty, disease, and neglect. Often, there are no long-term care options available for them in their native countries. Yet, there exist many affectionate, committed, and stable couples and individuals from other countries who would love to have the opportunity to raise these children in their homes. However, the children may never find their way to these potentially loving homes and the happily ever after conclusion because it is not Dick and Jane who want to care for them, it is John and Jim.

In 1993, delegates from sixty-six countries met at the Hague in the Netherlands to create a treaty with a truly global impact.<sup>2</sup> That treaty, entitled, Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, hereinafter referred to as the "Hague Convention," purports to establish minimum standards for intercountry adoptions to prevent the abuses associated with such adoptions and to promote the welfare of homeless and abandoned children everywhere.<sup>3</sup> In so doing, the Hague Convention represents a revolutionary step towards a global law, breaking down national walls to achieve a common goal: ensuring the welfare and rights of homeless children.

Although the Hague Convention creates a uniform process by which the

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1. Elizabeth Bartholet, *Beyond Biology: The Politics of Adoption and Reproduction*, 2 DUKE J. GENDER L. & POL'Y 5, 11 (1995).

2. The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, 1139 [hereinafter Hague Convention].

3. See *id.* at 1134.

ratifying countries will conduct intercountry adoption, it does not necessarily propose form without substance. Several countries, including Canada,<sup>4</sup> Mexico, Sri Lanka, and Romania have already ratified the Hague Convention and proposed implementing legislation. Thirty-six other States have signed the Hague Convention, indicating their intent to eventually ratify and implement it.<sup>5</sup> How, then, will the Convention's impending worldwide implementation affect the ability of persons traditionally disfavored as adoptive parents, namely gay and lesbian people, to adopt across national boundaries? If the goal of the Convention is, as its Preamble suggests, to ensure that children "grow up in a family environment, in an atmosphere of happiness, love, and understanding,"<sup>6</sup> then it must be implemented in such a way as to fully accept the eligibility and suitability of homosexual persons as potential adoptive parents. Recognized as the first formal stamp of approval on intercountry adoptions,<sup>7</sup> perhaps the Convention can also serve as the first formal recognition of homosexual persons' desirability as intercountry adoptive parents.

This Note will examine the possible impact of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption upon intercountry adoptions by those traditionally disfavored as adoptive parents. It will begin with a look at the background of intercountry adoptions and then turn to the goals and mechanics of the Convention's adoption scheme. After examining the arguments for and against intercountry adoption by homosexuals, the feasibility of adoption by these persons under the Hague Convention will be discussed. Finally, this Note will propose suggestions for the implementation and interpretation of the Convention such that more children may find permanent, loving homes.

## I. THE EVOLUTION OF INTERCOUNTRY ADOPTION

Perceived as the "perfect solution" to the dilemma of parentless children and childless want-to-be parents,<sup>8</sup> adoption is defined as "the method provided by law to establish the legal and social relationship of parent and child between

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4. *Canada Ratifies Convention on Intercountry Adoption*, XINHUA ENG. NEWSWIRE, Feb. 26, 1997, available in 1997 WL 3746725.

5. Hague Convention, *supra* note 2, at 1139.

6. *Id.*

7. Peter H. Pfund, *Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise*, 28 FAM. L.Q. 53, 56 (1994).

8. Joan Heifetz Hollinger, *The Uniform Adoption Act: A Reporter's Ruminations*, 30 FAM. L.Q. 345, 345 (1996).

persons who are not so related by birth with the same mutual rights and obligations that exist between children and their birth parents.”<sup>9</sup> The world first recognized the possibility of transnational adoption following World War II. Before that time, adoption was largely viewed as a strictly national option, and a burdensome one at that, for placing orphaned children in permanent homes.<sup>10</sup> However, with the tragedies of war, the world became aware of the plight of thousands of displaced children; intercountry adoption arose as a humanitarian means to find homes for these children.<sup>11</sup> Similarly, in the 1960s, the aftermath of the Korean War brought increased global awareness to intercountry adoption; until recently, South Korean children represented the majority of those children adopted across national lines.<sup>12</sup> More recently, the fall of Ceausescu in Romania,<sup>13</sup> the civil war in Yugoslavia, and the dissolution of the former Soviet Union placed intercountry adoption in the global spotlight.

Presently, it seems that intercountry adoption has evolved from its roots as a “humanitarian act” into a “widely accepted option” for childless persons who wish to create a family.<sup>14</sup> Since World War II, Western societies have changed so that the “supply” of domestically adoptable children has become scarce. The increased use of contraceptives and the growing acceptance of single parents contributed to this Western “baby shortage.”<sup>15</sup> These facts and the notion that it is somehow less difficult to adopt internationally, have encouraged more Westerners to look to other nations for adoptable children.<sup>16</sup> Currently, most children available for intercountry adoption come from less-developed nations where factors including the stigma of illegitimacy, the minimal use of contraceptives, government instability, war, and poverty contribute to the population of homeless children.<sup>17</sup>

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9. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, EDUC., & WELFARE, PUB. NO. 80-30251, INTERCOUNTRY ADOPTION GUIDELINES (1980).

10. Lisa M. Katz, Comment, *A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 9 EMORY INT'L L. REV. 283, 285-86 (1995).

11. *Id.* at 286.

12. *Id.* at 286-87.

13. Peter H. Pfund, *The Hague Intercountry Adoption Convention and Federal International Child Support Enforcement*, 30 U.C. DAVIS L. REV. 647, 651 (1997).

14. Erika Lynn Kleiman, *Caring for Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J.L. & SOC. PROBS. 327, 333 (1997).

15. Katz, *supra* note 10, at 287. The perceived “baby shortage” refers to the shortage of adoptable white infants. Kleiman, *supra* note 14, at 334. Minority children, older children, and children with special needs are readily available for adoption in Western societies. *Id.*

16. Kleiman, *supra* note 14, at 333.

17. See Katz, *supra* note 10, at 287-88. Those countries which often serve as “sending” States or States of origin for children adopted internationally include: Brazil, Costa Rica, Colombia, Ecuador, Uruguay, Korea,

Within the last decade, on average, intercountry adoptions have accounted for fifteen percent of all “stranger” adoptions worldwide.<sup>18</sup> Indeed, this year alone, at least 9000 children will be placed in homes through intercountry adoption.<sup>19</sup> Although those who adopt internationally may face less waiting time than those who adopt domestically, it remains a costly choice. In addition, persons who adopt across national borders must contend with multiple bureaucracies and miles of “red tape.”<sup>20</sup> Further, the allegation that intercountry adoption serves as a front for black market baby-sellers has created more obstacles for intercountry adoptive parents to surmount.

## II. OVERVIEW OF INTERCOUNTRY ADOPTION UNDER THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION

Recognizing that intercountry adoption is a phenomenon with staying power, delegates to the 1993 Hague Convention convened to address the abuses and problems associated with it. In addition to the thirty-eight Member States to the Hague Convention for Private International Law, invitations were extended to and accepted by thirty-one non-Member States that have a significant interest in intercountry adoption.<sup>21</sup> Three objectives dominated the discussions at the Hague and account for the composition of the resulting treaty. First and foremost, the Hague Convention delegates sought to create “legally binding” minimum standards for conducting intercountry adoptions.<sup>22</sup> These standards include safeguards to prevent the abduction, sale, and trafficking of children.<sup>23</sup> Second, the delegates wished to establish a means of policing the participating nations to ensure compliance with these standards.<sup>24</sup> Finally, through the Hague treaty, the delegates hoped to strengthen the working relationship between States that traditionally “send” children through

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India, Chile, Guatemala, Peru, El Salvador, Russia, Albania, Bulgaria, and China. *Id.*

18. William L. Pierce, *Accreditation of Those Who Arrange Adoptions Under the Hague Convention on Intercountry Adoption as a Means of Protecting, Through Private International Law, The Rights of Children*, 12 J. CONTEMP. HEALTH L. POL’Y 535, 537 (1996). “Stranger adoptions” indicate adoptions by persons who have no blood or marriage relationship to the adopted child.

19. *Id.*

20. Katz, *supra* note 10, at 283-84.

21. *Id.* at 300-01.

22. *Id.* at 284; Devjani Mishra, *The Road to Concord: The Conflict of Laws Over Adoption by Gays and Lesbians*, 30 COLUM. J.L. & SOC. PROBS. 91, 93 (1996).

23. Hague Convention, *supra* note 2, at 1139.

24. Katz, *supra* note 10, at 284.

intercountry adoption and States that "receive" them.<sup>25</sup> In furtherance of this objective, the Hague Convention provides for the reduction of "red tape" and requires that all party States recognize intercountry adoptions made in accordance with its terms.<sup>26</sup>

The ultimate expression of the ideals which serve as the impetus behind these objectives are found within the Hague Convention itself. As provided in the Preamble, the goal that characterizes the Convention and unites the delegates from across the globe reads as follows: "Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love, and understanding."<sup>27</sup> Article 1 continues in the same vein by providing that intercountry adoptions should be made "in the best interests of the child and with respect for his or her fundamental rights."<sup>28</sup> It is for the furtherance of these goals that the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption took place, and it is for this reason that it was so well received.

With these statements regarding its ideological purpose, the Convention takes a stand on intercountry adoption that deviates somewhat from the intercountry adoption norms codified in the 1989 United Nations Convention on the Rights of the Child.<sup>29</sup> Because the Hague Convention has not yet been fully ratified and implemented, the United Nations (U.N.) Convention embodies the current predominate view of international adoptions.<sup>30</sup> Though the Hague Convention reflects the precepts of the U.N. Convention for the most part, it diverges on one significant point. While the U.N. Convention supports intercountry adoption only when all possible child-care solutions within the child's State of origin are "depleted," the Hague Convention prefers intercountry adoption to any impermanent care options available within the child's native country.<sup>31</sup> Under the U.N. Convention, intercountry adoption is

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25. *Id.* Receiving States which are signatories to the Convention include: the United States, France, Sweden, the Netherlands, Italy, Canada, Finland, Switzerland, and the United Kingdom. See Hague Convention, *supra* note 2, at 1139. Among the sending States which have signed are Brazil, Costa Rica, Mexico, Romania, Israel, and Chile. *Id.*

26. Hague Convention, *supra* note 2, at 1142; Katz, *supra* note 10, at 283-84.

27. Hague Convention, *supra* note 2, at 1139.

28. *Id.*

29. Pierce, *supra* note 18, at 538-40.

30. See *id.* at 539, 550.

31. Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448, 1464 [hereinafter U.N. Convention](adopted by U.N. General Assembly Resolution 44.25); Katz, *supra* note 10, at 304.

the solution of last resort because a child's placement should reflect his or her "ethnic, religious, cultural, and linguistic background."<sup>32</sup> Though not entirely rejecting this belief, the Hague Convention prioritizes the "advantage of a permanent family," even if that family does not share the child's background.<sup>33</sup> Under the Hague Convention, intercountry adoption is considered preferable even to foster care options available in the child's native State.<sup>34</sup> This deviation from the preceding established norms demonstrates the Hague Convention's fundamental tenet that permanency is crucial to a child's well-being.<sup>35</sup>

### III. THE HAGUE CONVENTION'S ADOPTION SCHEME

The Hague Convention goes beyond the explication of hopes for future uniformity of intercountry adoption procedures. It submits a plan to make the goals expressed in its preamble a reality. At the heart of the Hague Convention's intercountry adoption scheme lies the concept of the Central Authority. The treaty requires that each participating State create a Central Authority to carry out the Convention's duties.<sup>36</sup> Each Central Authority will serve as the State's single authoritative source for information about intercountry adoptions.<sup>37</sup> The Hague treaty leaves to the individual States the task of determining the make-up of the Central Authority. A State may decide to compose an entirely new entity or to form the Central Authority by altering preexisting organizations. To illustrate, in the United States, adoption experts expect the Immigration and Naturalization Service and the Department of Health and Human Services to form the nation's Central Authority.<sup>38</sup> The Convention does allow the designation of multiple Central Authorities in States with more than one system of law or territorial units.<sup>39</sup> In addition, the Hague Convention permits the Central Authorities to delegate some of their functions to specially accredited bodies.<sup>40</sup>

Though the Central Authority must remain the contact point and primary source of information, the designated accredited bodies may provide

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32. U.N. Convention, *supra* note 31, at 1464; *See also* Pierce, *supra* note 18, at 539.

33. Hague Convention, *supra* note 2, at 1139.

34. Pfund, *supra* note 7, at 56.

35. Kleiman, *supra* note 14, at 365.

36. Hague Convention, *supra* note 2, at 1140.

37. *Id.*

38. Pfund, *supra* note 7, at 68.

39. Hague Convention, *supra* note 2, at 1140.

40. *Id.*

individualized attention to the intercountry adoptions which take place in the State.<sup>41</sup> If properly accredited, the bodies can “facilitate, follow, and expedite” adoption proceedings.<sup>42</sup> This provision allows the State to rely upon already established adoption services, including public agencies, private agencies, and independent adoption intermediaries. The Hague Convention’s implementation may affect the ability of smaller private agencies to provide adoption services.<sup>43</sup> Also, independent adoptions which are facilitated by an intermediary, such as a social worker or lawyer, may be hindered by the accreditation requirements of the Convention.<sup>44</sup>

Even though the Hague Convention recognizes the benefit of accredited bodies, the responsibility of preventing adoption abuses lies with the Central Authorities. Article 33 of the treaty provides a “competent authority which finds that any provision of the Convention has not been respected or that there is a serious risk that it may not be respected, shall immediately inform the Central Authority of its State. This Central Authority shall be responsible for ensuring that appropriate measures are taken.”<sup>45</sup> “Appropriate measures” may include the disaccreditation of the adoptive service implicated in the violation.<sup>46</sup> Also, if the Hague Convention violation is serious enough, a child that has been placed with prospective adoptive parents in the receiving State may be removed from that home and placed in temporary care until another suitable permanent placement becomes available.<sup>47</sup> Only as a last resort will a child be sent back to the State of origin.<sup>48</sup>

#### *A. The Sending and Receiving States’ Responsibilities Under the Hague Convention*

Under the Hague Convention, the function of the State’s Central Authority depends upon its status as either the sending or receiving State. The sending State, the adoptive child’s State of origin, actually determines the child’s

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41. *Id.*

42. Katz, *supra* note 10, at 314.

43. Pfund, *supra* note 7, at 67.

44. *Id.* Adoptions by independents were a source of great debate during the 17th Session of the Hague Convention. Many believe that the abuses of intercountry adoption have arisen through independent adoptions, and many sending States would like to take them out of the intercountry adoption process all together. *Id.*

45. Hague Convention, *supra* note 2, at 1143; *see also* Pfund, *supra* note 7, at 65.

46. Pfund, *supra* note 13, at 656.

47. Hague Convention, *supra* note 2, at 1141-42.

48. *Id.* at 1142.



adoptability.<sup>49</sup> First, the sending State considers whether the child meets the qualifications for adoptability provided in its domestic adoption laws.<sup>50</sup> Also, the sending State must obtain the necessary consents.<sup>51</sup> The Central Authority ascertains whether the birth parents consented freely without the influence of illicit compensation.<sup>52</sup> After the Central Authority determines the child's adoptability, it must prepare a written report about that child, detailing such items as his or her background and medical history.<sup>53</sup>

While the sending State determines the child's suitability for intercountry adoption, the receiving State examines the potential adoptive parents' eligibility and suitability.<sup>54</sup> According to the Hague Convention, potential adoptive parents must submit an application for intercountry adoption to the Central Authority located in their State of "habitual residence."<sup>55</sup> Under no circumstances may the potential adoptive parents directly contact an adoptive child's parents or his or her immediate caregivers.<sup>56</sup> The Central Authority of the receiving State then prepares a report explaining the eligibility of the potential adoptive parents. Among the items included in this report are the potential adoptive parents' identities, their reasons for choosing intercountry adoption, and their ability to undertake such an adoption.<sup>57</sup> Additionally, the report may include the potential adoptive parents' family and medical histories.<sup>58</sup> Finally, the report discusses the characteristics of the children whom the receiving State believes may be appropriately cared for by the potential adoptive parents.<sup>59</sup> Usually, the contents of this report are gleaned from home studies conducted by social workers within the receiving State. Indeed, the social workers' role in the intercountry adoption process is of the utmost importance.

Next, the receiving State's Central Authority delivers the potential adoptive

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49. *Id.* at 1139; Pfund, *supra* note 7, at 57.

50. Hague Convention, *supra* note 2, at 1139.

51. *Id.* at 1140. Necessary consents may include the birth parents, national authorities, and institutions, depending on the demands of the domestic law. Also, if the adoptive child is older, his or her consent may be required as well. Katz, *supra* note 10, at 310.

52. Hague Convention, *supra* note 2, at 1141.

53. *Id.*

54. *Id.*

55. *Id.*; Katz, *supra* note 10, at 307.

56. Hague Convention, *supra* note 2, at 1143; See Jorge L. Carro, *Regulation of Intercountry Adoption: Can the Abuses Come to an End?*, 18 HASTINGS INT'L & COMP. L. REV. 121, 151 (1994).

57. Hague Convention, *supra* note 2, at 1141.

58. *Id.*

59. *Id.*

parents' report to the sending State where that State's Central Authority proceeds to match the potential adoptive parents with potential adoptive children.<sup>60</sup> Under current intercountry adoption processes, the child may be matched according to the wishes of the potential adoptive parents.<sup>61</sup> The Hague Convention demonstrates its intention to adhere to the child's best interests by matching the potential adoptive parents to the needs of the child. On the basis of the respective reports, the sending State's Central Authority makes the ultimate decision as to whether the "envisaged placement" is in the child's best interests.<sup>62</sup>

*B. Recognition of Intercountry Adoptions Under the Hague Convention*

Once a child has been matched with potential adoptive parents, adoption may proceed in either the sending or receiving States.<sup>63</sup> Currently, recognition of an intercountry adoption by one State does not necessitate its recognition in another. The Hague Convention would change this. The treaty's Article 23 provides: "[a]n adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognized by operation of law in the other Contracting States."<sup>64</sup> Recognition requires acknowledging the legal relationship which exists between the child and his or her adoptive parents, "the parental responsibility of the adoptive parents for the child," and "the termination of pre-existing parental relationships."<sup>65</sup>

Only when a Contracting State determines that an "adoption is manifestly contrary to its public policy, taking into account the best interests of the child," may it refuse to recognize a Convention adoption.<sup>66</sup> Commentators suggest that this exception to the blanket rule of recognition should be utilized only under exceptional circumstances.<sup>67</sup> Peter Pfund, the co-leader of the United States' delegation to the Convention, believes that "it is highly unlikely that any third State party to the Convention would have a legitimate interest great enough to make adoption 'manifestly contrary to its public policy.'"<sup>68</sup>

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60. *Id.*

61. *See id.*

62. *Id.*

63. *See id.*

64. *Id.* at 1142.

65. *Id.*

66. *Id.*

67. Pfund, *supra* note 7, at 58.

68. *Id.*

## IV. ADOPTION BY HOMOSEXUAL PERSONS

Presently, for the young, stable married couple, stranger adoption is a long and sometimes difficult process. For the homosexual couple, stranger adoption is not only difficult, but nearly impossible. Often, openly homosexual persons cannot adopt domestically, whether for public policy reasons or due to the prejudices inherent in a State's domestic adoption procedures.<sup>69</sup> Therefore, some homosexual persons have looked to international adoption to create the family they desire. As already discussed, the Hague Convention will create a globally uniform process for intercountry adoption that should curb the abuses associated with international adoptions and cut through some of the bureaucratic "red tape." Nonetheless, the question remains, Will the Hague Convention's implementation facilitate or discourage intercountry adoption by homosexuals?

*A. Homosexuals as Adoptive Parents*

Historically, among all potential adoptive parents, homosexuals face the greatest opposition. The arguments against same-sex parenting have been threefold: (1) children of homosexual parents will grow up to be homosexuals; (2) children of homosexual parents will not attain sufficient personal development; and (3) children of homosexual parents are more likely to be sexually abused by their parents or their parents' friends.<sup>70</sup>

Research reveals that these three concerns arise from prejudice and have no basis in fact.<sup>71</sup> According to leading social scientists and psychologists, sexual orientation is unrelated to parental ability. As recognized by Dr. Pepper Schwartz, the "primary quality of parenting is not the parenting structure, or biology, but [it] is the nurturing relationship between parent and child."<sup>72</sup> The "special skills" requisite for good parenting do not exclusively reside with those people who happen to be heterosexual; rather, "people possessing those special skills are found across the spectrum of human sexuality."<sup>73</sup> The concern that homosexual parents are more likely to raise homosexual children is simply

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69. Mishra, *supra* note 22, at 92-93.

70. *Id.* at 93.

71. Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191, 201 (1995); Mishra, *supra* note 22, at 101.

72. *Same-Sex Parenting* (visited Jan. 6, 1998) <[http://www.religioustolerance.org/hom\\_pare.htm](http://www.religioustolerance.org/hom_pare.htm)>.

73. Joseph Evall, *Sexual Orientation and Adoptive Matching*, 25 FAM L.Q. 347, 348 (1991).

unfounded. Studies conducted thus far have indicated no strong correlation between the sexual orientation of the child and the sexual orientation of the care-giving parents.<sup>74</sup>

Second, studies support that children raised by gay or lesbian parents adjust and perform well in social situations.<sup>75</sup> Homes headed by homosexuals provide as much support to encourage the child's psychological and emotional growth as heterosexual homes.<sup>76</sup> Homosexual homes can provide a stable environment for a child, because gays and lesbians "form life-long commitments . . . [that] in fundamental ways . . . resemble companionate marriages between people of different sexes."<sup>77</sup> Although there may be some legitimacy to the argument that children of homosexuals face a degree of stigmatization from their peers, this concern is not the basis for a blanket denial of all homosexual potential adoptive parents.<sup>78</sup>

The most disturbing argument against homosexual adoption, that the children are more likely to be sexually abused, is also unsupported. Statistically, heterosexual males comprise the great majority of sexual abusers of children.<sup>79</sup> In fact, not one social science study of children in homosexual homes provides any evidence supporting the concern regarding sexual abuse.<sup>80</sup>

In sum, a person's sexual orientation should not categorically exclude him or her from consideration as an intercountry adoptive parent. Sexual orientation has no bearing on the quality of parental care a person can provide. In fact, there are potential additional benefits to same-sex adoptive parenting. For instance, children raised by homosexual parents may have a greater appreciation for other minority groups.<sup>81</sup> Thus, they may have a head start in understanding the value of diversity. Also, adoptive children of homosexuals may be certain that their parents really wanted them because they went to such great lengths to adopt them.<sup>82</sup>

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74. Patterson, *supra* note 71, at 198-99.

75. Kleiman, *supra* note 14, at 345-46.

76. Patterson, *supra* note 71, at 205.

77. Jennifer Gerada Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 751 (1995).

78. Mishra, *supra* note 22, at 101.

79. Patterson, *supra* note 71, at 199.

80. *Id.*

81. Patterson, *supra* note 71, at 203.

82. *Id.* at 204.

*B. Intercountry Adoption by Homosexuals Under Pre-Hague Convention Procedures*

While there is no credible reason for denying homosexuals the opportunity to adopt internationally, it is difficult for them to do so. Most intercountry adoptions now proceed through private adoption agencies and independent adoptive services.<sup>83</sup> These agencies currently exercise complete discretion in determining the eligibility of prospective parents to adopt, subject only to State or territorial laws.

Typically, agencies rank the potential parents according to certain observable characteristics. Larger private agencies commonly place young, heterosexual, married couples at the top of their eligibility lists. Single and older persons or couples are placed somewhere near the middle, and homosexuals are relegated to the bottom.

Smaller, nondenominational, private agencies and independent adoption services are less restrictive in their ranking procedures;<sup>84</sup> therefore, homosexuals may find greater success as potential adoptive parents through these sources. Additionally, rankings for domestic adoptions are more strict than for intercountry adoptions, and intercountry adoptions are less likely to be contested.<sup>85</sup> This makes international adoption an attractive option for gays and lesbians.

For example, in the United States, the largest receiving State for intercountry adoptions, pre-Hague Convention home studies for international adoptions are less rigorous than those conducted for domestic adoptions.<sup>86</sup> Home studies include personal interviews, home visits, and subjective assessments of the potential adoptive parents' parenting ability and living conditions.<sup>87</sup>

Agencies must take into account the laws of both the sending and receiving States. Where neither State restricts adoption by homosexuals or single persons, agencies have tremendous power in determining who may adopt. Indirectly, the social workers who conduct the home studies share this power as

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83. Pierce, *supra* note 18, at 547.

84. Kleiman, *supra* note 14, at 344.

85. *Id.* at 346.

86. *Id.*

87. Dan Berger, Note, *Improving the Safety and Efficiency of Foreign Adoptions: U.S. Domestic Adoption Programs in Other Countries Provide Lessons in INS Reform*, 5 CORNELL J.L. & PUB. POL'Y 33, 43 (1995).

their observations and conclusions significantly determine whom the agencies deem eligible to adopt. Therefore, the prejudices of both the agencies and the social workers may come into play and result in ineligibility for gays and lesbians who wish to try intercountry adoption. Unfortunately, no concrete statistics are available as to the number of intercountry adoptions performed by homosexual applicants, and the agency ranking system may be to blame. In an effort to avoid disqualification based sexual orientation, some gay and lesbian prospective parents conceal their homosexuality to remain eligible for agency-conducted adoptions.<sup>88</sup>

#### V. THE FEASIBILITY OF INTERCOUNTRY ADOPTION BY HOMOSEXUALS UNDER THE HAGUE CONVENTION

##### *A. The Hague Convention Goals Applied to Intercountry Adoption by Homosexuals*

As examined, the current complex processes for intercountry adoptions allow for adoption by gays and lesbians to some extent. How, then, will the impending implementation of the Hague Convention modify this? The goals and objectives of the Hague Convention indicate that the treaty's implementation should not only allow intercountry adoptions by homosexuals, but actively facilitate it. As articulated in the Hague Convention's Preamble, the Convention recognizes, above all else, that it is crucial for a child to grow up in a permanent, loving, family environment.<sup>89</sup> By acknowledging that desirable intercountry potential adoptive parents include homosexuals, the Hague Convention can more fully realize this goal. Gay and lesbian homes potentially represent thousands of permanent placements for the world's homeless children.<sup>90</sup>

By its very nature, intercountry adoption creates families with mixed racial, ethnic, and religious backgrounds. The possibility exists that a child adopted transnationally will experience social stigmatization even if he or she is placed in a home with heterosexual parents. The primary goal of the Hague Convention implies that providing children with food, shelter, love, and a permanent family is more important than ensuring that the child is not subjected

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88. Bartholet, *supra* note 1, at 7.

89. Hague Convention, *supra* note 2, at 1139.

90. Bartholet, *supra* note 1, at 6.

to social stigma because his or her adoptive parents are homosexual or of a different race, religion, or ethnicity.

Many gays and lesbians have demonstrated their desire to become parents,<sup>91</sup> and research indicates that homosexuals can and do provide loving homes for children. Intercountry adoptions by homosexuals can deliver more children from the despair of poverty, disease, and neglect. It makes sense for the States' Central Authorities, which will operate under the Hague Convention, to allow and facilitate international adoptions by homosexuals.

In addition, the Hague Convention articulates the desire that intercountry adoptions proceed in the child's best interests.<sup>92</sup> A "best interests" test need not, and should not, give any weight to the potential adoptive parents' sexual orientation. Sexual orientation is irrelevant for the purposes of adoption.<sup>93</sup> Instead, the sending State should consider the more pertinent factors contained within the receiving State's report on the potential adoptive parents. The reports' factors, such as the potential adoptive parents' parenting style, financial stability, home environment, background, and medical history better indicate the potential intercountry adoptive parents' fitness.

#### *B. The Hague Convention Adoption Scheme and Intercountry Adoption by Homosexuals*

If the Hague Conventions' goals promote intercountry adoption by homosexuals, do its prescribed processes facilitate such adoptions? The Hague Convention does allow homosexuals to engage in intercountry adoption, but the reality remains that gay and lesbian potential adoptive parents will still have to forum-shop for countries which permit adoption by homosexuals. In its current form, the Hague Convention proposes no uniform parental eligibility requirements;<sup>94</sup> thus, the Contracting States determine adoptive parent eligibility according to their domestic laws and their own interpretation of the "best interests" test. Under the Convention, the receiving State's Central Authority determines parental eligibility, but the sending State does have the power to veto any potential adoptive parent.<sup>95</sup>

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91. *Id.* The reproductive technology industry has recognized that many homosexuals desire to become parents and have actively courted them as clients. *Id.*

92. Hague Convention, *supra* note 2, at 1139.

93. Patterson, *supra* note 71, at 201.

94. Hague Convention, *supra* note 2, *passim*.

95. Patterson, *supra* note 71, at 1141.

Therefore, potential homosexual adoptive parents must reside in a State which permits adoption by homosexuals. If so fortunate, they must also hope that the sending State will not question their eligibility. Bulgaria and Romania are among the sending States which expressly prohibit adoption by homosexuals as unmarried cohabitants or singles.<sup>96</sup> Still, there are many sending States that have less restrictive requirements and leave the door open for homosexuals who desire to adopt transnationally. Unfortunately, as it stands, the Hague Convention does nothing to change the uncertainty which attends the homosexual person or couple's quest to adopt a child across national boundaries.

In addition, the implementation of the Hague Convention may actually discourage intercountry adoptions by homosexuals. As previously discussed, intercountry adoptions proceed mostly through private adoption agencies and independent intermediaries. Under the Hague Convention, these services must seek accreditation by the States' Central Authorities. Central Authorities will probably limit the number of accredited bodies. Consequently, smaller private agencies and independent intermediaries are at a disadvantage and less likely to receive accredited status than larger agencies. Furthermore, the Convention provides that States do not have to cooperate with independent intermediaries if they so choose.<sup>97</sup> Yet, the smaller private agencies and independent adoptive services with less restrictive eligibility rankings may be the only avenue available to homosexuals seeking to adopt internationally. The Hague Convention's Central Authority scheme may practically exclude homosexuals from the pool of potential intercountry adoptive parents.

Also, the Hague Convention makes private adoptions less private because all intercountry adoptions must proceed through the States' Central Authority.<sup>98</sup> This could create a situation where potential adoptive parents are scrutinized by a number of separate authorities: the accredited adoptive service, the receiving State's Central Authority, and the sending State's Central Authority. With each level of scrutiny, the biases and prejudices against same-sex parents are more

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96. Cf. Alexandra Zugravejcu & Ana Iacoiescu, *The Adoption of Children in Romania*, in INTERCOUNTRY ADOPTION LAWS AND PERSPECTIVES OF 'SENDING' COUNTRIES 39, 40 (Eliezer D. Jaffe ed., 1995); Tzankova Tzankova, *Adoption According to Bulgarian Family Law*, in INTERCOUNTRY ADOPTION LAWS AND PERSPECTIVES OF 'SENDING' COUNTRIES 53, 56 (Eliezer D. Jaffe ed., 1995). These countries prohibit homosexual adoption by refusing to allow cohabitants to adopt. Although there have been recent developments in recognizing same-sex marriages, generally, gays and lesbians are not recognized as married couples, so even those with the most long-enduring relationships cannot adopt in these nations.

97. See Hague Convention, *supra* note 2, at 1142.

98. Pfund, *supra* note 13, at 653.



likely to surface. This increased scrutiny may curb some intercountry adoption abuses, but will leave prospective homosexual adoptive parents more vulnerable to attack.

Another potential barrier to intercountry adoption by homosexuals lies in the “public policy” exception to the Convention’s blanket recognition provision.<sup>99</sup> The Hague Convention does not specify on what grounds a State may refuse to recognize an adoption made in accordance with its terms. Therefore, if intercountry adoptive parents choose to move from the receiving State to another participating State or even another territory within the same State, they run the risk that the new residence will not recognize their relationship to their adoptive child. In the particular case of homosexual adoptive parents, the fear that the new State of residence will invoke public policy reasons for refusing to recognize the adoption is more pronounced and reasonable. This exception to the Convention’s recognition provision gives States too much room to wreak havoc on the lives of the adopted child and parents who have already secured legal recognition of their relationship.

#### VI. RECOMMENDATIONS FOR THE IMPLEMENTATION OF THE HAGUE CONVENTION

In its current form, the Hague Convention does little to encourage intercountry adoption by gay or lesbian potential adoptive parents. The Hague Convention does not purport to create uniform substantive laws for intercountry adoptions; it merely institutes uniform processes to carry out these adoptions. Despite this, the Hague Convention can be a powerful force for substantive change. The Hague Convention demonstrates that countries from across the globe can come to a consensus when something as important as the welfare of their children is at stake. Already, the participant States have agreed that finding permanent placements for abandoned and homeless children is of paramount importance; the more loving, stable, and permanent homes available to intercountry adoptees, the more likely the Hague Convention will meet its goals.

The Hague Convention could clarify its existing terms and thereby promote intercountry adoption by gays and lesbians. Also, delegates could amend the treaty to make the determination of potential adoptive parents’ eligibility less subject to abuse and discrimination. Because it promotes intercountry

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99. Hague Convention, *supra* note 2, at 1142; Katz, *supra* note 10, at 324.

adoptions that will create interracial, intercultural, and interfaith families, the Hague Convention is implicitly tolerant of diversity. If it were to more explicitly state its stance against any type of discrimination in the intercountry adoption process, the Hague Convention could open additional permanent homes for the world's homeless children. Finally, the special sessions, which periodically convene to discuss the implementation and progress of the Convention, can serve as a forum for ideas and suggestions regarding the eligibility of potential adoptive parents.

The most obvious means by which the Hague Convention could facilitate intercountry adoption by homosexuals would be to incorporate into the Convention uniform eligibility requirements for potential adoptive parents. Those eligibility requirements could demand that no potential adoptive parents be excluded from adopting internationally because of race, religion, ethnicity, or sexual orientation. However, due to cultural differences and diverse social policies, the participating States probably could not reach an agreement as to what qualities a desirable potential adoptive parent would possess.

Still, less direct measures may effectively promote homosexuals as potential intercountry adoptive parents. By clarifying its vague language, the Hague Convention may encourage intercountry adoption by these traditionally disfavored adoptive parents. For example, the Convention provides participating States with little guidance as to what grounds are sufficient to invoke the "public policy" exception to the required recognition of Hague Convention adoptions laid out in Article 23.<sup>100</sup> Though experts encourage States to narrowly construe the exception, the only language within the treaty that suggests this reading lies in the words: "taking into account the best interests of the child."<sup>101</sup> In effect, this employs more vague language to explain vague language. For this reason, countries may abuse the public policy exception. States could conceal prejudices against same-sex adoptive parents by invoking public policy. Peter Pfund suggests that to prevent such abuse, States should use the public policy exception only when the policy is grounded in statutes.<sup>102</sup> The Convention could require States to statutorily deal with the public policy exception. This would relieve some of the uncertainty which homosexuals face when they seek to adopt according to the terms of the Hague

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100. Hague Convention, *supra* note 2, at 1142.

101. Jennifer M. Lippold, Note, *Transnational Adoption from an American Perspective: The Need for Universal Uniformity*, 27 CASE W. RES. J. INT'L L. 465, 498 (1995).

102. Cf. Pfund, *supra* note 7, at 73.

Convention. However, even if a State has reduced public policy to written form, the Convention should prohibit the State from invoking obsolete statutes and policies to deny intercountry adoptions.

To illustrate on a national level, if the Hague Convention were a Federal statute in the United States, a state could attempt to refuse to recognize a Hague Convention adoption where the adoptive parent is homosexual. The state may support this refusal by citing the public policy inherent in statutes which prohibit homosexual behavior.<sup>103</sup> However, this functions as a pretext to justify prejudice against same-sex parents. In reality, the antisodomy and antihomosexual behavior statutes are antiquated and rarely enforced.<sup>104</sup> To invoke the Convention's public policy exception on these grounds would be ludicrous and unfair to the adoptive parents and the adopted child.

The Hague Convention can further curb "public policy" abuse by more narrowly defining the situations where public policy may properly be invoked. Situations where the public policy exception is appropriate may include the following: (1) discovery of illicit payments to birth parents; (2) discovery that the adopted child was procured through black market baby-selling; (3) criminal behavior on the part of the adoptive parents; and (4) physical or sexual abuse of the adopted child. Of course, the list could not exhaustively enumerate all the appropriate reasons to invoke the exception, but it could guide the States before they refuse to recognize an intercountry adoption.

To prevent abuses of the public policy exception, the delegates to the Hague Convention could also amend the Convention to create an appellate body which would review cases where a third-party country refuses to recognize an international adoption. This act would require States to document the grounds for refusal, substantiate the public policy invoked, and demonstrate how the particular intercountry adoption violates that policy. With these additions and clarifications, homosexual adoptive parents could at least clear the public policy hurdle to intercountry adoption.

Already the Hague Convention allows accredited bodies to provide post-adoptive services and pre- and post-adoptive counseling. For those that seriously question the ability of homosexuals to act as parents in the best interests of an adopted child, this provision should allay some of their concerns. The broad and vaguely written provision does not specify how the accredited bodies should proceed with these services and what subjects they should

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103. Mishra, *supra* note 22, at 129.

104. *Id.* at 130.

encompass. Perhaps the Hague Convention could better explicate the uses of this provision and illustrate how the States might apply it. For instance, it could state whether the post-adoptive services include periodic check-ups on the status of the adoptive family.

In addition, by slightly enlarging its scope, the Hague Convention may facilitate homosexual intercountry adoptions. The delegates to the Convention could incorporate guidelines for the home studies, conducted by the receiving States, to determine the eligibility of potential adoptive parents. The National Association of Social Workers in the United States has already made an effort to create national accreditation requirements for social workers involved in domestic adoption processes.<sup>105</sup>

The Hague Convention could expand upon this idea and create minimal accreditation requirements and guidelines for social workers and similarly qualified persons who conduct home studies for intercountry adoptions. The persons who evaluate the home environments of potential adoptive parents paint a picture of the prospective parents for the bodies who will ultimately determine their eligibility to adopt transnationally. How the social workers color the prospective parents in their reports effectively determines who the State's Central Authority will or will not allow to adopt. To a large degree, the home study reports are gleaned from the subjective impressions of the persons who conduct them. Minimal accreditation requirements and guidelines could check their ability to abuse this power. To fairly evaluate prospective adoptive parents, the Hague Convention guidelines could propose a more uniform and objective system.

Further, the Hague Convention could require that at least two different social workers conduct home studies of the potential adoptive parents. In this way, personal biases may be weeded out, rendering a more fair final report to guide the Central Authority's decision on the potential parents' eligibility. This could create a more level playing field for all persons who wish to provide a permanent home for the world's homeless children.

Finally, a special commission of delegates to the Hague Convention convenes periodically to discuss the Convention's implementation and progress.<sup>106</sup> This commission can use its influence to facilitate intercountry adoption by traditionally disfavored adoptive parents such as gays and lesbians. If the commission included discussions about prospective adoptive parent

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105. Pierce, *supra* note 18, at 545.

106. Pfund, *supra* note 7, at 65.

eligibility in its discourse, the participating States' Central Authorities would take notice. The special commission could issue reports reaffirming and interpreting the Convention's goals such that no person is categorically excluded from intercountry adoption because of their race, religion, or sexual orientation. Although the original Convention does not specifically state that homosexuals should be permitted to adopt under its terms, a statement by the commission to that effect may influence some participating States to reconsider their eligibility requirements. By formally recognizing that homosexuals are desirable as intercountry adoptive parents, the commission may indirectly facilitate Hague Convention adoptions by gays and lesbians.

### CONCLUSION

The fact remains that millions of children across the globe do not have permanent homes. They do not have loving parents to care for them. The happily ever after conclusion they read about in storybooks seems impossible. Yet, through intercountry adoption, permanent placements and families can be located for these children. The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption was established to find permanent homes for children through international adoption.

Currently, the number of homeless children far exceeds the number of prospective adoptive parents; but, barriers exist such that a significant population of suitable, loving, potential adoptive parents are discouraged from adopting internationally. The Hague Convention can better meet its goals by recognizing that this population, gays and lesbians, are desirable as intercountry adoptive parents. As a worldwide consensus on the role and processes of intercountry adoption, the Hague Convention should clarify its terms, amend the treaty to make parental eligibility determinations more fair, and publicly acknowledge that stable, loving persons who happen to also be homosexual have a place in the intercountry adoption process. As a result, more children could realize the advantage of growing up in a permanent family environment.